STATE OF MICHIGAN

COURT OF APPEALS

MILES PARKKONEN, Plaintiff-Appellant,	UNPUBLISHED June 4, 2015
v	No. 320952 Marquette Circuit Court
DEAD RIVER CAMPERS, INC., Defendant-Appellee.	LC No. 12-050888-CH

Before: GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

In 1920, in preparation for the construction of a dam that would swell the Dead River into an impounded lake, plaintiff Miles Parkkonen's predecessor conveyed an interest in certain riverfront property to defendant Dead River Campers' (DRC) predecessors. Nearly a century later, the poorly worded document has fueled a battle between the parties over access to the shoreline. After careful consideration of the conveyance's language, we conclude that the circuit court correctly determined that DRC holds fee simple title to certain land encompassed within the boundaries of Parkkonen's parcel description. The circuit court erred, however, in setting DRC's boundary at 1,355 feet above sea level rather than at the water's edge. Accordingly, we affirm in part and reverse in part the judgment quieting title in DRC's favor.

I. BACKGROUND

Prior to 1920, the Michigan Iron and Land Company owned expansive acreage in the Dead River Watershed in the Upper Peninsula. In 1920, Michigan Iron and Land conveyed interests to Groton Realty Corporation and John M. Longyear in a laundry list of properties along the river. Groton and Longyear intended to construct a series of dams that would produce hydroelectric power and create several lakes. Eventually, Parkkonen would become the owner of a parcel carved from Michigan Iron and Land's original holdings, described as the northwest quarter of the southwest quarter of section 9, township 48 north, range 26 west. Parkkonen's chain of title indicates that the interest conveyed was "subject to all existing rights and easements" of record. The interest conveyed by Michigan Iron and Land to Groton and Longyear affecting Parkkonen's parcel "cover[s] approximately five acres of land." The warranty deed provided:

> [Michigan Iron and Land] hereby Conveys and Warrants to Groton Realty Corporation . . . and John M. Longyear of Marquette County, Michigan . . . so

> much of the southerly portion as may be flooded or overflowed permanently or intermittently by the waters of Dead River raised by a dam in or across said Dead River to elevation approximately 1355 feet above the waters of Atlantic Ocean upon and out of that certain piece or parcel of land situate and being in the County of Marquette and State of Michigan[.]

Following a string of transfers, DRC took the interests conveyed to Groton and Longyear. DRC asserted that it owned in fee simple approximately five acres of Parkkonen's parcel, under and along the river impoundment and dry land up to 1,355 feet above sea level. DRC used its claim of interest to deny Parkkonen access to the shoreline. Parkkonen, on the other hand, believed DRC merely possessed an easement limited to the area that was permanently or intermittently flooded rather than to a static elevation. Therefore, Parkkonen contended that he possessed the right to access the river impoundment from his land.

Unable to resolve their dispute, Parkkonen filed suit to quiet title in 2012. Following discovery, the parties filed cross motions for summary disposition and the circuit court ruled that DRC held a fee simple interest to the "surface rights . . . of the described lands up to an elevation of 1,355 feet above sea level." This appeal followed.

II. STANDARDS OF REVIEW

We review de novo a circuit court's decision on a motion for summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, 300 Mich App 139-140.]

An action to quiet title is equitable in nature and we review de novo the lower court's decision in that regard. *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011). "A deed is a contract and the proper interpretation of the language in a deed is therefore reviewed de novo on appeal." *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009) (citations omitted).

III. ANALYSIS

As conceded by both parties, the 1920 deed is a poorly drafted document that created confusion regarding the nature of the interest conveyed. Critical review of the document

supports the circuit court's conclusion that Michigan Iron and Land conveyed fee simple title to Groton and Longyear in 1920, which has since been passed to DRC. DRC's fee simple interest, however, does not permit it to block Parkkonen's access to the shoreline. Contrary to the circuit court's assessment, DRC does not possess title up to an elevation of 1,355 above sea level. DRC owns only "so much of the southerly portion as may be flooded or overflowed permanently or intermittently." Approximately 85 years have elapsed since construction was completed, and the impoundment lake's water level has been well recorded and stabilized by the height and use of the relevant dam. That water level governs the boundary of DRC's interest and does not interfere with Parkkonen's rights as a littoral/riparian land owner.[1]

> Whether a conveyance creates an easement, or an estate, depends upon the intent of the parties as determined by construction of the conveyance. Classification of an interest in land as an easement or as an estate is a legal classification resting ultimately upon the nature of the legal relations which the parties intended to create. [Restatement, Property, § 471, Comment b, p 2962.]

Various factors assist a court in determining whether the parties intended to convey fee simple or create an easement. As described in Restatement, Property, § 471, p 2961:

> In determining whether a conveyance creates an easement or an estate, the following factors are important
>
> (a) the degree of precision with which the conveyance describes that part of the conveyor's land affected by it; and
>
> (b) the extent to which the conveyance limits the uses authorized by it.

4 Powell, Real Property, § 34.04[7], pp 34-35 – 34-36, describes as "significant factors" to consider:

> (1) the particularity of the description of the affected lands;
>
> * * *
>
> (3) the exact wording found in the instrument.

Our Supreme Court has given us similar guidance:

> An inquiry into the scope of the interest conferred by a deed such as that at issue here necessarily focuses on the deed's plain language, and is guided by the following principles:

[1] Land abutting a river includes riparian rights, while land abutting a lake includes littoral rights. It appears that this case involves a hybrid as the river was flooded to make a lake. See *2000 Baum Family Trust v Babel*, 488 Mich 136, 138 n 1; 793 NW2d 633 (2010).

> (1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable.
>
> These four principles stand for a relatively simple proposition: our objective in interpreting a deed is to give effect to the parties' intent as manifested in the language of the instrument. [*Mich Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005) (citations omitted, alterations in original).]

The primary consideration is the language employed in the conveyance. Here, Michigan Iron and Land employed a warranty deed and used the phrase "conveys and warrants" to describe the transfer. MCL 565.151 provides that "any conveyance of lands worded in substance as follows: 'A.B. conveys and warrants to C.D. (here describe the premises) for the sum of (here insert the consideration),' . . . shall be deemed and held to be a conveyance in fee simple to the grantee . . . ." The conveying language in the instrument supports a fee simple transfer consistent with the statute.

Michigan Iron and Land's use of an imprecise description of the land conveyed does not suggest an easement in this case. As conceded by the parties, no dams had yet been constructed in 1920. At that point, no one could ascertain with certainty how much of the land would be flooded when the river pooled into impoundment lakes. The extent of the parties' knowledge in 1920 was that Groton and Longyear's hydroelectric plan would cause a portion of everyone's property along the river to flood, possibly as high as 1,355 feet above sea level. Accordingly, the grantor could not use a metes and bounds system or even give an exact measurement of the affected area. Instead, Michigan Iron and Land conveyed "so much of the" property "as may be flooded or overflowed permanently or intermittently," which amounted to approximately five acres of the parcel.

Further, the circuit court accurately interpreted the deed's description that the conveyed interest was "upon and out of that certain piece or parcel of land" as "carv[ing]" the interest out of Michigan Iron and Land's title. Parkkonen urges this Court to interpret this phrase as creating only an easement. However, the phrase "upon and out of" is substantively different than the many easement grants cited by Parkkonen. For example, the easement granted in *Carmody-Lahti*, 472 Mich at 363, was "across the tract or parcel of land." In *Westman v Kiell*, 183 Mich App 489, 494; 455 NW2d 45 (1990), the railroad easement was granted "upon and across lands." Similarly, the deed in *Quinn v Pere Marquette R Co*, 256 Mich 143, 146; 239 NW 376 (1931), granted an easement "upon and across the lands." Use of the word "across" in these examples was poignant. "Across" means "in a position reaching from one side to the other." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 12. The phrase "out of" has a different connotation. "Out of" is "used as a function word to indicate origin, source, or cause." *Id.* at 881. The source

of the disputed property is the larger parcel in Parkkonen's chain of title. Nothing in the deed language suggests that DRC's interest merely reaches across Parkkonen's property from one side to the other. Accordingly, we discern no error in the circuit court's description that DRC's fee interest was "carved out" of Parkkonen's larger parcel.

The 1920 deed also fails to include use limitations that are common in documents creating easements. As noted by the parties, property throughout the Dead River Watershed was impacted by the construction of five dams along the river. In some transfers, land owners conveyed flowage rights or rights to flood the land. The use of such language in those deeds clearly evidenced that the parties intended to convey an easement rather than fee simple title. The parties did not employ language limiting uses in this case, evidencing the parties' intent to convey a fee simple interest.

While the circuit court correctly described the type of interest conveyed, it erred in defining the physical limits of that interest. The circuit court determined that elevation 1,355 feet above sea level was a boundary line; Parkkonen possessed fee title to all lands above that mark and DRC to all lands below. This delineation is not in keeping with the language of the 1920 deed. The parties easily could have set a static line of 1,355 feet above sea level as the outer limit of DRC's interest. They did not. Instead, the parties to the 1920 deed conveyed an interest to "so much of the southerly portion [of the parcel] as may be flooded or overflowed permanently or intermittently by the waters of the Dead River . . . to an elevation approximately 1355 feet" above sea level.

The 1920 deed transferred only a portion of the property below 1,355 feet elevation. Understanding the phrase "so much of" is vital to properly interpreting this deed. "So" in this context is defined as "to an indicated or suggested extent or degree." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 1182. The closest definition in *Merriam-Webster's Collegiate Dictionary* (11th ed), p 813, for the term "much" is under the term "much as." That term is defined as "however much." *The Free Dictionary* at <http://www.thefreedictionary.com/so+much> (accessed May 22, 2015), defines "so much" as "[e]quivalent or equal in quantity, degree, or extent." These definitions suggest that "so much of" in relation to the "southerly portion" of the parcel means an amount limited by the parameters provided.

The parameters provided are the portion "as may be flooded or overflowed permanently or intermittently . . . to elevation approximately 1355 feet" above sea level. First and foremost, we note that it cannot possibly be said that 1,355 feet above sea level is the boundary line between the parties' interests. The deed does not set elevation 1,355 feet as a definite limit, only an "approximate[]" elevation. The circuit court read the term "approximately" out of the deed to find a definite boundary that does not actually exist.

The remainder of this description suggests a boundary that could not have been determined at the time the interest was conveyed. An online thesaurus gives alternatives to the phrase "as may be," including "can be," "conceivably," and "feasible." See <http://www.thesaurus.com/browse/as+may+be> (accessed May 22, 2015). "May," is defined as including permissibility and probability. *Merriman-Webster's Collegiate Dictionary* (11th ed), p 767. Although "may" has various definitions, the parties' intent is clarified when taken in

conjunction with the phrase "permanently or intermittently." This language establishes that the portion of the land over which DRC has an interest must be assessed at a particular point in time. DRC's interest extends only to the flooded portion of the land at any given time. The outer edge of DRC's interest fluctuates with the level of the water. DRC's interest ends at the shoreline, the same point at which Parkkonen's begins.

We note that the relief granted in this opinion is beneficial to Parkkonen despite that we have affirmed the judgment against him. By granting a fee interest only to so much of the land as may be permanently or intermittently flooded, Parkkonen's predecessor-in-interest reserved title up to the water's edge. Parkkonen therefore enjoys the rights and privileges of a littoral/riparian owner. He may use the shoreline and have direct access to the lake. See *Thies v Howland*, 424 Mich 282, 287-288; 380 NW2d 463 (1985). As long as Parkkonen does not take extraordinary action or attempt construction below the high water mark, the parties should be able to peaceably coexist in the future.

We affirm in part and reverse in part. We remand for entry of a final order consistent with this opinion.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto